

NTSB Order No.
EM-132

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION BOARD
WASHINGTON D. C.

Adopted by the NATIONAL TRANSPORTATION BOARD
at its office in Washington, D. C.
on the 10th day of April, 1986

JAMES S. GRACEY, Commandant, United States Coast Guard
Commandant,

ROBERT F. MCDOWELL, Appellant.

Docket ME-117

OPINION AND ORDER

Appellant challenges a July 11, 1985 decision of the Vice Commandant (Appeal No. 2396) affirming a suspension of his merchant mariner's license (No. 007651) for three months on twelve months' probation that was ordered by Coast Guard Administrative Law Judge Rosemary A. Denson on October 5, 1984 following an evidentiary hearing held on December 15, 1983.¹ The law judge had sustained a charge of negligence on a specification alleging that the appellant, while serving as pilot aboard the M/V ANANGEL SPIRIT during an approach to MacArthur Lock in St. Mary's River, failed to maintain control of his vessel with the result that it collided with the M/V INDIANA HARBOR.² On appeal to the Board, appellant contends for a variety of reasons that the evidence of record does not support the charge of negligence.³ For the reasons that follow we agree and will reverse the probationary suspension.

The parties agree that the collision occurred because appellant's vessel sheered to port into the INDIANA at a time when appellant was attempting, with the assistance of a tug, to position the SPIRIT along the lock wall on the south side of the South Canal

¹Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

²The ANANGEL SPIRIT (hereafter the "SPIRIT") is a 539 feet long oceangoing vessel. The INDIANA HARBOR (hereinafter the "INDIANA") is a 1000 foot long, 105 foot wide vessel designed for service on the Great Lakes.

³The Coast Guard has filed a reply brief opposing the appeal.

for an approach to the MacArthur Lock while the INDIANA, having just departed the adjacent Poe Lock, was proceeding up the north side of the canal. The sheer appears to have developed as a result of currents toward the lock gates acting on the SPIRIT's bow as it neared the lock wall that were caused by the more or less simultaneous filling of the MacArthur Lock and the movement of water alongside the INDIANA as it accelerated out of the Poe Lock.⁴ It also appears that the effect of bank suction on the SPIRIT's stern helped render ineffectual appellant's efforts to check the sheer by backing the vessel. The law judge found that appellant, after the sheer began, "did everything that a prudent pilot would have done" (Decision and Order at 12). She nevertheless found him guilty of negligence on the ground that he should have been aware of the alleged conditions in the approach to the lock and acted accordingly to avoid the effects of these conditions" (id. at 11).⁵

On appeal to the Vice Commandant, the appellant argued in effect that the law judge's negligence finding, apart from being unsupported by any substantial, reliable or probative evidence in the record, was inconsistent with the basis of liability set forth in the specification; namely, that he had negligently "failed to maintain control of" his vessel. The Vice Commandant, without reviewing the record to determine whether there was an adequate evidentiary basis for sustaining the charge under the specification, treated appellant's argument as an attack on the sufficiency of the specification itself, an attack in which the Vice Commandant found merit because the specification neither alleged "particular facts amounting to negligence, or sufficient facts to raise a legal presumption which [would] substitute for particular facts" (Decision at 6). Instead of dismissing the charge on the basis of the concededly deficient specification, however, the Vice Commandant concluded that the appellant suffered no prejudice based on surprise because, in the Vice Commandant's view, "[i]t was clear throughout the hearing that the central issue was Appellant's responsibility for the M/V ANANGEL SPIRIT'S sheet into the path of the M/V INDIANA HARBOR" and that issue, among others, he asserted, had been "fully litigated" on the record. Id. at 7.

⁴Although appellant had requested that the filling of the lock be stopped until after the SPIRIT was properly positioned or secured on the wall, it takes several minutes for the lock valves to close completely.

⁵The conditions referred to by the law judge are "the water action created by the approaching Indiana in this narrow channel, bank suction, and the draw from the lock itself as it was filling". Decision and Order at 9.

Having thus rejected appellant's argument that the law judge's negligence finding could not be sustained absent evidence establishing the allegation in the specification, the Vice Commandant proceeded to rule that no evidence of negligence was necessary in any event because the fact that appellant's vessel sheered into the path of another vessel raised a presumption that he had been negligent. To rebut this presumption, according to the Vice Commandant, the appellant had to show that there were no additional precautions which he could have taken which would have prevented the sheer from occurring. Since the appellant in the Vice Commandant's view had made no such showing, the charge was upheld. We cannot endorse the Vice Commandant's reliance on an evidentiary presumption to sustain on appeal a charge of negligence that the evidence presented at the hearing did not establish.

Under the specification served on the appellant, the Coast Guard had the burden of proving that the collision with the INDIANA was the result of a negligent failure to maintain control of the SPIRIT. To meet that burden, the Coast Guard was required to establish, pursuant to the regulatory definition of negligence, that appellant had either committed "an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit" or that he had failed "to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." 46 CFR 5.29. No effort was made at the hearing, however, to adduce proof of such an act or failure to act. Rather, the Coast Guard's evidence proved only that appellant's vessel had sheered into the INDIANA, a circumstance that appellant did not dispute and one that neither established negligence under the regulation nor demonstrated that appellant's failure to maintain control of the vessel was blameworthy as alleged in the single specification underlying the charge.

To avoid the evidentiary shortcomings in the Coast Guard's presentation, the Vice Commandant asserts that the sheer into another vessel itself created a presumption of negligence that it was appellant's obligation to rebut. We have no occasion to rule on the validity of such a presumption in the context of a suspension-revocation proceeding, for we have no difficulty concluding that the reliance on such a presumption in the circumstances of this case was reversible error because it not only changed the basis of the charge of negligence against the appellant, but also because the presumption changed the appellant's evidentiary burden without affording him an opportunity to meet it. In other words, while the original specification obligated the Coast Guard to prove negligence under the standard set forth in the regulation, an obligation it failed to satisfy, reliance on the presumption obligated the appellant to disprove negligence, an

obligation he obviously could not satisfy after the hearing had concluded. We think the Vice Commandant's determination to uphold the conviction of negligence on a ground neither pleaded nor tried must be rejected and the case evaluated in light of the manner in which the issues were actually litigated, namely, without reliance on any presumption concerning negligence.⁶

As noted, supra, the law judge found the appellant negligent essentially because he had not anticipated the risk of a sheer and taken actions to avoid that possibility. Assuming that the specification fairly can be read to have faulted the appellant for some error of judgement or navigation committed before the sheer began, it was incumbent on the Coast Guard to present evidence as to what it believed that alleged error might have been. Since none was presented, there is no basis in the record for the law judge's conclusion that (Decision and Order at 11) "[a]ll of the events preceding the collision could have and should have been foreseen and compensated for" by appellant and that he had not encountered any "conditions that were beyond his expectation or control." The law judge's theories and opinions as to what might have happened and how it might have been avoided are no substitute for, and do not constitute, and absent a substantial, probative, and reliable showing that appellant did something he should not have done or failed to do something he should have, he cannot be sanctioned for negligence.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted, and
2. The order suspending appellant's marine license is reversed.

BURNETT, Chairman, GOLDMAN, Vice Chairman and LAUBER, Member of the Board, concurred in the above opinion and order.

⁶Neither the Coast Guard Investigating Officer who tried the case nor the law judge appears to have been aware at the time of the hearing of any presumption related to the fact of a sheer of one vessel into the path of another.